UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

JOHN R. BUND II, personally, as Executor of the Estate of Richard C. Bund, deceased, S. SCOTT JAMES and NOEL L. JAMES, a married couple, and on behalf of others similarly situated,	)	
Plaintiffs,	)	No. 2:16-cv-00920-MJP
vs.	)	Seattle, WA
SAFEGUARD PROPERTIES, LLC, a Delaware corporation,	)	
Defendant.	)	Motion Hearing July 18, 2018

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JUDGE MARSHA J. PECHMAN
UNITED STATES DISTRICT COURT

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THE CLERK: This is the matter of John R. Bund vs. Safeguard Properties, Cause Number C16-920.

Counsel, please make your appearance.

MR. GATENS: Good morning, Your Honor. Clay Gatens, on behalf of plaintiffs and the class. And I'd also like to introduce Mr. John Bund, plaintiff in this action, to the Court as well.

MS. TERRELL: Good morning, Your Honor. Beth Terrell, from Terrell Marshall Law Group, on behalf of plaintiffs and the class.

MS. CHANDLER: Good morning, Your Honor. Blythe Chandler, also from Terrell Marshall Law Group, on behalf of plaintiffs and the class.

MS. GRAY: Good morning, Your Honor. Devon Gray, also on behalf of plaintiffs.

THE COURT: Good morning, all.

MR. FELLER: Good morning, Your Honor. Leonid Feller, from Kirkland & Ellis, on behalf of Safeguard. I have with me Safeguard's general counsel, Linda Erkkila. And we also have Jaime Allen, from Davis Wright, and Kelly Mulder, also from Kirkland & Ellis.

THE COURT: Good morning to you.

MR. FELLER: Good morning, Your Honor.

THE COURT: Counsel, we're here this morning on the motion for a preliminary injunction. And for the record, I'd

like to review that I have read the motion and reviewed the attachments on plaintiffs' motion for preliminary injunction; the defendant's opposition to plaintiffs' motion for preliminary injunction; the reply, filed by the plaintiffs, motion for preliminary injunction; and defendant's surreply and motion to strike.

Is there anything else that I should have reviewed in order to be prepared to hear you this morning?

MR. GATENS: Not from plaintiffs, Your Honor.

MR. FELLER: Your Honor, there are -- there were some declarations filed in connection with the motion.

THE COURT: Yes. I'm talking about the full package.

MR. FELLER: That's everything. Thank you.

THE COURT: You should have received questions for oral argument that I sent out. Those are questions that I'd like to have you answer sometime during the argument. It's not required that you answer them up front or at the end. You can answer them in the body of your argument. That's entirely up to you. But by the end of the day, I'd like to have some answers to those questions.

All right. Plaintiffs, what would you like to tell me?

MR. GATENS: Good morning, Your Honor, and good morning to the Court. Again, Clay Gatens, on behalf of the plaintiffs and the class.

As Your Honor referenced, the Court did issue some

questions to the parties, some directed to plaintiffs, some directed to the defendant, and then some directed to both. I would like to just start my portion addressing those questions, and I'd like to reserve five minutes for rebuttal, if I may.

Your Honor, the first question that the Court directed to plaintiffs asks whether and how the plaintiffs have standing to prevent lock changes that have not yet occurred. And the answer to that question is really twofold.

First, the existing plaintiffs and existing class members do have Article III standing, under the U.S. Supreme Court's holding in *Lyons*, because they don't have just evidence of past wrongful lock changes. Now, certainly, those past wrongful lock changes are evidence of a future harm, but they are not future harm, in and of themselves. But, importantly, in this case and in the record before this Court, there is both the real threat of future harm as well as the immediate threat of future harm.

And the real threat is found in the fact that the defendants have produced a list, which they won't refer to as a class list, but it's a list. It's before this Court at Docket 243-1 as Exhibit B, and it's also Safeguard production 008221. That list identifies all class members -- it might be overinclusive -- but it identifies all class members. And we have de-duplicated and sorted that list to determine that that list shows over 5,000 initial lock changes and re-lock changes

on class members' properties. That means that evidence shows that the act of a wrongful lock change is not a singular act; that Safeguard will go on and re-key and re-lock a property, even after initial lock change, for various reasons; and that that has occurred on over 5,000 class members' properties.

But more importantly, the defendants, in sort of an alarming candor, disclosed to this Court in their response, which is Docket 250, beginning at Page 3 through 4, that even subsequent to the Washington State Supreme Court's decision in *Jordan vs. Nationstar*, that they changed locks again, for a second or more time, on the same borrower's property, both prior to *Jordan* and then again after the *Jordan* decision, in over 150 instances. And then further, they disclose a couple hundred -- it looks to be about 3-, maybe 400 -- more post-*Jordan* lock changes on class members' properties, for reasons that they state are secondary access doors or some unilateral determination of abandonment that is inconsistent with Washington statutory law, under RCW 7.28.230, and inconsistent with the holdings of *Jordan* and its progeny. And so those are evidences of real, ongoing harms.

Now, importantly, with regard to an immediate threat, the defendant states in its response papers -- I'd like to direct the Court's attention to this -- Docket 253, Page 8, Paragraph 9: Safeguard and its vendors must perform the tasks identified by the client as delineated. Safeguard acts at the

discretion of its lender clients. Safeguard cannot exercise any discretion to go beyond the requested work order and client direction. This means that Safeguard says: We conducted illegal lock changes prior to the decision in *Jordan*. We conduct them repeatedly, in multiple times, on the same borrower's property. And we will continue to do so, without exercising any of our own discretion, as long as our client directs us to do that. We've done it over 150 times to properties, both post- and pre-*Jordan*, and we're continuing to do it to new properties, if directed. And the purpose, the express purpose of these lock changes and repeated lock changes, is to allow for the future and ongoing entry and trespass upon these borrowers' properties. So that's why the class members have Article III standing to enjoin future lock changes; because there is the immediate threat of those lock changes, and they are real.

Now, with regard to members that are -- individuals that are not currently class members, i.e. Washington borrowers that they have not yet changed locks on, there is standing to enjoin them under Washington law, because the plaintiffs have brought this motion for preliminary injunction under the Consumer Protection Act. And Washington law, specifically, and Washington State Supreme Court law, in *Hockley vs. Hargitt*, 82 Wn.2d 337, addresses this specific context of an attempt to enjoin non-plaintiffs in the context of bringing a CPA

action. And *Hockley vs. Hargitt* directly says that plaintiffs can bring those motions on behalf of others because the purpose of the CPA is to protect the public interest, and, two, the plain language of 19.86.090 does not restrict a plaintiff from trying to enjoin actions against non-plaintiffs. And, specifically, the Court said they can do this because -- even if such violation would not directly affect the individual's own property rights.

And so the answer to the Court's question, under both Article III constitutional standing and statutory standing under Washington law and the Consumer Protection Act, is, the class has a current, immediate, and real threat of ongoing lock changes and future harms, as well as other members -- other borrowers who are not yet a member of the class.

The Court asked a second question, Your Honor, and it asked expressly whether the defendant's vendors, in exercising possession, are they exercising possession when they secure only a secondary entrance on the borrower's property. And the answer to that question is, yes, absolutely. The borrower's exclusive right to possession, under 7.28.230 and *Jordan* and all of its progeny, make zero distinction based on which door Safeguard is changing the lock on. It doesn't matter if it's the front door or the back door, because the act of changing a lock, as the *Jordan* court has held and every federal district court subsequent to that decision has held, is an act of

possession, and that disrupts the borrower's exclusive right to possession. But more importantly, again, Safeguard admits that the purpose of these locks, whether they're on the front door or the back door, is to allow for ongoing, unnoticed entries into this borrower's home, and including the purpose of reinstalling the locks if they happen to be removed.

THE COURT: Your request for an injunction asks for me to stop conduct going forward. You also have some requests for things that they should do immediately, going backward. Those two things are very different. And if I were to issue a preliminary injunction that says you may not touch class members' homes a second time, a third time, you don't touch them, period, wouldn't that satisfy it? And if you do the remedial work, doesn't that diminish the damages that the class members could ultimately present?

MR. GATENS: Certainly, Your Honor, we are seeking both a prohibitory injunction, prohibiting future actions, as well as remedial injunction, or a compulsive injunction.

We've narrowly tailored the request for this injunction as narrowly as possible. And with respect to the remedial injunction, unlike the characterization the defendant has put in front of this Court, we have never asked for them to go out and wholesale remove the locks. What we've asked them to do is to take reasonable efforts to contact the borrowers and let them know of their right to the exclusive possession of the

property, and offer to restore it. And we do believe that that narrow request is reasonable, but it's tailored to help mitigate the damages in this case. We unabashedly seek, through these motions, to reduce and mitigate the ongoing harm that is happening to those borrowers. And we feel that the narrow request to contact them, inform them of their right to exclusive possession, which is consistent with the recent legislation that's been passed, is an appropriate measure to mitigate the ongoing damages that are occurring.

THE COURT: Go ahead.

MR. GATENS: Your Honor, but in sum, to answer the Court's question, no. Whether it's a front door or a back door does not implicate possession, under the law and the statutes, and certainly the borrower whose home is going to be reentered at some time, unnoticed, probably -- it's no different to them whether it's happening through the front door or the second door.

There was a third question -- this question was addressed to both parties -- and it asks, what's the impact of the recent House Bill 2057 legislation? And then it also asks whether the injunctive relief sought by plaintiffs supports or complies with that.

With regard to the first question, what's the impact of House Bill 2057, well, the impact of the House Bill 2057 is, it just further informs the illegality of Safeguard's admitted,

stated, ongoing practices. It in no way allows for, and, in fact, directly makes further illegal, that you can change locks simply because your vendor determines they can see -- or abandonment, or some variation thereof. And that legislation directly informs that.

But it also informs that it's consistent with, again, RCW 7.28.230, because House Bill 2057 did not repeal or replace 7.28.230. It was expressly added to the non-foreclosure statute, 6124. And it's also consistent with longstanding law, under RCW 7.28.230, that that's the exclusive right and possession of the borrower. So, if anything, what House Bill 2057 does is, says, whether it's now or whether it was then, how they act and how they tell this Court they're going to continue to act does not comport with the law or the legislature.

THE COURT: All right. But how can I give you a preliminary injunction that asks for more than what the house bill asks for? In other words, if I tell them, "You have to obey the house bill," isn't that all I can do? Otherwise, you've got a federal judge legislating additional requirements.

MR. GATENS: I think that that's a fair point, Your Honor. And to be very clear, we are not asking for this Court to rule in the nebulous fashion of, "Hey, Safeguard, you just need to comply with the law." What we're asking this Court to rule is that if you are going to conduct a post-default,

pre-foreclosure lock change, for the first time or again, on a borrower class member's property, that you either get their consent, get approval from the Court -- and there's multiple vehicles to do that -- or you comply with the provisions of House Bill 2057. And so that's narrowly tailored to say, if you're going to do this activity -- you don't have to do it. But if you're going to do it, you have to get consent, approval of the Court, or you have to comply with the provisions of House Bill 2057, which is why, to the second part of that question, the relief sought here by plaintiffs does comport with and comply with House Bill 2057. It doesn't add additional requirements, and it doesn't legislate from the bench in that regard.

Now, with respect to the last question that was, again, directed to both the plaintiff and the defendant, the Court has asked that we address the impact of the dispositive -- the pending dispositive motions on the injunctive relief. And for the Court's reference, there are two pending dispositive motions. There's defendant's motion to dismiss as well as effectively four motion/cross-motions on some discrete issues for summary judgment.

The answer to the Court's question is, those pending dispositive motions do absolutely bear on the Court's ability to issue the injunctive relief sought by the plaintiffs. Because under *Winter*, and under all of the jurisprudence, one

of the elements that we must show is the likelihood to succeed on the merits. That's why plaintiffs moved, under the CPA, for the injunctive relief in the CPA only, is because, again, under Washington state law, that provided the statutory standing. But moreover, we have shown, we believed, more than a substantial likelihood that we will prevail on the merits as to the CPA claim, as well as others, but specifically the CPA claim.

THE COURT: You moved under the CPA claim. Are you conceding, then, if the CPA claim fails, that your request for preliminary injunction fails as well?

MR. GATENS: It fails as to individuals or borrowers in the state that have not yet had a lock change conducted on them. It doesn't fail as to the existing class members that already have the requisite Article III standing but wouldn't have -- or wouldn't, excuse me, need the statutory standing that Washington state law applies for people who have not experienced this yet.

THE COURT: Okay. So you see a division between those that are future class members, as opposed to the ones who are already here.

MR. GATENS: I do, Your Honor. And that's why I think the Article III standing and the analysis under *Lyons*, demonstrating evidence of a real and immediate threat, is certainly applicable to the existing plaintiffs and class

members. But I think the secondary analysis about people that are not yet a member of the class but borrowers that in the future could experience these lock changes -- which, again, they say, unequivocally, they will do when ordered from their clients -- those individuals have to have some other type of standing. And that's the statutory standing that we cite to under the -- excuse me -- the *Hockley vs. Hargitt* Washington State Supreme Court case. And that's exclusively limited to action brought under the CPA, again because of the public interest component of that action.

THE COURT: Okay. What else would you like to tell me?

MR. GATENS: I would -- unless the Court has further questions, I'd like to reserve some time for rebuttal, and I have nothing further at this time.

THE COURT: Thank you.

MR. FELLER: Good morning, Your Honor.

THE COURT: Good morning.

MR. FELLER: Again, Leonid Feller, on behalf of Safeguard. I'd like to reserve a couple of minutes, if I need to, for reply.

Your Honor --

THE COURT: Counsel, before you get started, I want to address something with you, is that, in your brief, you made reference to the other motion, the CPA motion, that has been

filed, and incorporated by reference that material. You can't do that. And so that material is not going to be considered at this time. But what I will tell you is, I'm not going to issue any ruling until I've had a chance to evaluate both motions.

MR. FELLER: Thank you, Your Honor. And I apologize to the Court. Obviously, we intended no disrespect. And we were in a situation -- as you know, we were brought into the case, I think, in late March. And within three weeks, we had literally four sets of very significant briefing due at the same time. So that's why that happened, and I apologize.

Your Honor, there are five very basic reasons why this preliminary injunction motion fails. And I'd like to run through them, quickly. I'm going to try to answer the Court's questions in that context. If I don't, I will follow up.

Number one, standing. And we have to look at -- at some point, we have to get past the rhetoric, and we have to get to the real facts of the case, and the real facts of these two sets of named plaintiffs that we have, only one of whom is a class representative. The second was added after the Court's class certifications.

As to Mr. Bund -- and I don't know how much of the recent filings the Court has seen. We had filed a motion for a status conference. Plaintiff had filed a motion to substitute -- we agree, there is no dispute, that the named plaintiff in this case today, Bund, does not own this property, and has not owned

it since 2013, and did not own it in 2015 when the lock change happened. And as a result, that plaintiff cannot have standing. And they admit it, and that's why there is a motion to substitute.

I will get to this later, Your Honor, but about three years ago, you wrote an opinion called *Reese vs. Malone*, December 7, 2015. And it's 2015 Westlaw 13450693. And we had a very similar situation, where you had -- it was a securities class action. A class was certified. You had a named plaintiff. It turned out the named plaintiff didn't own the right kind of security. And so the plaintiffs moved to substitute. And the Court, citing Ninth Circuit law, because there was -- this is Ninth Circuit law, is, you can't substitute a class rep. And what has to happen is, the case has to be decertified and dismissed. And so we'll get to all of that later, but I think something there is no dispute about is, the estate did not own the property at the time. And whatever happens later, as of today, the estate does not have standing.

Beyond --

THE COURT: Counsel, one of the least persuasive pieces of material that you can cite to me is me. So I hope that if you're going to rely upon that, you cited somebody else too.

MR. FELLER: Again, this briefing hasn't happened,

but I will cite to you what you cited, which is the Ninth Circuit opinion in *Lierboe vs. State Farm*, 350 F.3d 1018. That's a Ninth Circuit decision, published Ninth Circuit decision.

So that -- beyond that, Mr. Bund, we now know -- and we have learned a great deal in the last four to six weeks. We know that the Bund property was vacant. And we -- I don't want to quibble about vacant versus abandoned, but we now have discovery responses that say: Yes, I admit, I wasn't living there. I wasn't sleeping there. From Bund senior's death in 2011 until 2016, after the lock change, the property was vacant. Mr. Bund might stop in from time to time, once a month. He was thinking about renting it. He was thinking about selling it. There might be some maintenance that needs to be done. But it was vacant. And there is no dispute about that fact.

In 2016, the property was rented. We found that out in a discovery response, about a week ago. And about, say, three weeks ago, according to Zillow -- we've subpoenaed the realtor -- about three weeks ago, a contract for sale was signed on the property. And I don't know if that transaction has closed or not yet. So that's Mr. Bund. We know the estate, the actual plaintiff, doesn't own the property, and we know at the time nobody was living there.

As far as the James plaintiffs, again, they were added, I

think, in April, after class cert. We haven't deposed them yet. We don't have formal discovery. But they have helpfully submitted a declaration, which we moved to strike, which might have been improvident, but the declaration says: We moved out of the house. We were not living there. And our son -- supposedly, again -- was coming by to do maintenance from time to time, but we weren't living there. And so this idea, that people are being ousted from homes, we do not have. And I would challenge Mr. Gatens, when he stands up here, to name to you a real, live human being in this case who was supposedly living in a house and was ousted. That is the *Jordan vs. Nationstar* fact pattern. Right? It's not Safeguard. Safeguard had nothing to do with that.

In *Jordan* -- and I want to talk more about the *Jordan* case, obviously. In *Jordan*, Mrs. Jordan woke, allegedly -- woke up in the morning, went to work, came home, and she couldn't get into the house. And she couldn't get in, because there was only one lock. There is nothing remotely close to that with regard to Safeguard. There is no human being who alleges anything of the kind.

Okay. So that's --

THE COURT: Well, does there need to be? Or is it the human being's right to the property, whether or not they're physically ousted, that's important?

MR. FELLER: Sure. And that is a critical issue,

Judge. And what we desperately need in this case is an interpretation of *Jordan* as to all of these other issues. But I will submit to you, Your Honor -- and I will read to you from the *Jordan* case, and this will go to your question about secondary locks. This is the language from *Jordan*: Nationstar contends its usual practice is to change the locks on only one door, such that it can --

THE COURT: Counsel, I can't get a record on you when you speak that --

MR. FELLER: Let me slow down, Judge. I'm sorry.

Nationstar contends -- this is Page 881 of *Jordan*: Nationstar contends that its usual practice is to change the lock on only one door, such that it can access the home in the future, but also so that the owner can still enter through another door. Here, Jordan's home had only a front door and a sliding glass door in the rear. Therefore, when Nationstar's vendor re-keyed the front door, she had no means of entry. Okay. And then they then go through: Well, is this a problem?

There is no dispute, Judge, that Washington law is that the homeowner gets possession of the property through foreclosure. What is new about *Jordan*, what no one had ever conceived was possible, and certainly --

THE COURT: I'm sorry. I think you misspoke. The homeowner doesn't get possession through foreclosure. The homeowner loses possession through foreclosure.

MR. FELLER: No, no, no. Under Washington law, the home is entitled to have possession through foreclosure.

THE COURT: That's the word you missed.

MR. FELLER: I apologize, Your Honor.

What was new about *Jordan* was the idea that the lock change, for purposes of securing and for purposes of maintenance, disrupted possession. Now, why did the *Jordan* court say that was the case? Not because there was a lock change. Right? Quote -- this is Page 887: In property law, possession is defined as a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land. The key element to the property definition of possession is the certain degree of physical control. Tort law requires -- similarly requires control. In tort law, which is concerned primarily with liability, a possessor of land is defined -- and this is critical -- as a person who occupies the land and controls it. And they get to the conclusion: She, Ms. Jordan -- this is Page 888 -- could no longer access her home without going through Nationstar. This action of changing the locks and allowing her a key only after contacting Nationstar for the lockbox code is a clear expression of control. There has to be a person there. And that person has to be unable to get into the property. That is what *Jordan* is

about.

You asked about the significance of HB 2057. HB 2057 is a judicial fix because nobody could figure out what it is that *Jordan* meant. *Jordan* certainly cannot mean that in every circumstance, you can't do a lock change. It can't mean that, and plaintiffs admit that it can't mean that. And so -- because we know that there is deeds in lieu of foreclosures. We know there is bankruptcy sales. We know there is actual consent. We know there are all sorts of circumstances where lock changes are totally fine. And plaintiffs admit it.

THE COURT: Doesn't the house bill tell you that there are three ways to do it, you get consent, you get a court order, or you go through the process of getting the cities to respond? And those are the three ways you do it, according to the rule.

MR. FELLER: Your Honor, that is the three ways you do it. You don't have to take my word for it. Right? I'm going to read to you from plaintiffs' briefs, okay. This is Docket Number 253, at Page 4. "Plaintiffs agree that, if proven, borrowers in the following categories fall outside of the class definition: Padlock only, on a non-residential structure; lockbox only, without lock change; padlock and lockbox only, without lock change; post-sale lock change; deed in lieu of foreclosure executed prior to lock change; and bankruptcy sale" -- "bankruptcy sale completed prior to lock

change."

Plaintiffs also say -- and this is at Docket Number 55, at 2 and 3 -- Safeguard can obtain borrower consent authorizing its entry. It can seek the appointment of a receiver. It can bring a nuisance action. It can seek injunctive relief. HB 2057 is a legislative fix that says: Okay. Here is one way that you can secure a home without having to go to court. But it doesn't say it's the only way. And, again, plaintiffs admit, deeds in lieu of foreclosures, bankruptcy sales, there are all sorts of things that happen where a borrower --

THE COURT: A bankruptcy sale is a court order.

MR. FELLER: Okay. A deed in lieu of foreclosure -- well, the final bankruptcy is ultimately an order, but the bankruptcy sale can happen during the course of the bankruptcy. I don't pretend to be --

THE COURT: It's under the supervision of the provisions of the Court --

MR. FELLER: Sure.

THE COURT: -- and deed in lieu of foreclosure is consent.

MR. FELLER: Sure.

THE COURT: So of all the things that you just read off, doesn't the house bill cover each of them?

MR. FELLER: The house bill is -- there's no question that the house bill today is one way to go secure a property.

But the point -- the house bill came after *Jordan*. Right?

THE COURT: Well, what's the harm to you in a preliminary injunction if I tell you you have to follow the house bill?

MR. FELLER: Well, Your Honor, the question isn't following the house bill -- and Safeguard does follow the house bill. And, basically, the policy is to follow the house bill now, because that makes things really simple. And so we know that the number of lock changes post-*Jordan* has now substantially decreased.

But the question isn't really what is the harm to Safeguard. The harm to Safeguard, Judge, is that there are going to be -- and there's also a question, right -- what these come down to is the facts of any given situation. Right? And if someone at some point says, "Well, the affidavit that you got from the code enforcement officer was defective," we're now not only accused of violating the house bill, we're now accused of violating your injunction.

THE COURT: Not if the injunction and the house bill are the same.

MR. FELLER: Well, but -- correct. But, Your Honor, there are all sorts of things that happen where, inadvertently, somebody screws up. Right?

THE COURT: But that's exactly what the injunction is supposed to prevent, is the screwups. Because it says: You've

got to be careful, and you've really, really, really got to be careful.

MR. FELLER: And, Your Honor -- respectfully, Your Honor, I think it has -- the question has it backwards. Right? Because the question isn't what's the harm to Safeguard. The question is -- the burden is, you've got to show irreparable harm to get the injunction. And we know there isn't any irreparable harm to Mr. Bund, who doesn't have standing. We know there isn't any irreparable harm to the James.

THE COURT: Well, let me go back to my question, though, is, what difference does it make to Safeguard if there's an injunction that says you have to follow the house bill? That should be obvious; right?

MR. FELLER: Your Honor, Safeguard absolutely has to follow the house bill. There is no question. But there are also other avenues, other -- right? The house bill doesn't talk about bankruptcy sales. The house bill doesn't talk about deeds in lieu of foreclosure. The house bill doesn't talk about express consent. The house bill is a mechanism that doesn't purport to be exclusive. So what your order would have to say is, it would have to go through a litany of every possible circumstance. And that's exactly what the *Jordan* court said we're not going to do. Right?

What the *Jordan* court said is: Okay. These entry provisions in mortgage contracts aren't a get-out-of-jail-free

card. But there's a whole second part to the *Jordan* holding, and that is: Okay. We're also not going to tell you that receivership is the exclusive mechanism to go -- we don't know, and we're not going to talk about, all the different ways that you can go and do this. That's not what this is about. What we're saying is that in this circumstance, where somebody wakes up in their house in the morning, and is locked out at night, and can't get in through the single door, that violates the law. Okay?

By the way, we had three dissenters in *Jordan* who didn't disagree with that basic proposition. The three dissenters in *Jordan*, on the facts of the case, said: Hey, majority, you've got this all wrong. This property was abandoned. And because this property was abandoned, under the restatement, that's an exception, and you can go secure. And so that's what the dissent says.

But, Your Honor, if I can just run through five reasons -- we're at one.

Your Honor, again, as far as the class -- first of all, we don't even have a 23(b)(2) class. Right? And so we got an order from you, before my time on the case, when we moved to strike the class certification order, and said: Safeguard, I don't know what you're worried about. This isn't a (b)(2) class, so injunctions aren't even in play here. And if we're worried about injunctions, it's got to be Bund; doesn't have

standing. James, their foreclosure closed a long time ago. As far as future folks, that's the *Zapata* case, 753 F.2d 727, Ninth Circuit. Got to be parties to the case. You can't give injunctions about future harm, to some future people, in something that may happen in the future.

Third reason, every single one of these folks has an adequate remedy at law. First adequate remedy, there is no dispute that notices are posted on every single one of these houses, with a phone number. All you've got to do is pick up the phone. That's what happened to Ms. Jordan when she got in that night. That's what happened to Mr. Bund. Took a little while, but he got in too.

So there is no question -- there is, again, rhetoric that, "Well, gee, somebody might see the notice, and they'll get intimidated, and might not call." No human being, no evidence, no one before you that that's true. All you've got to do is pick up the phone and call. But, again, even if you do that, don't do that, all of this is compensable by money damages. Mr. Bund, what was he doing in 2015 when he couldn't get in? He says, "I was trying to get the house ready for rent," which he does in 2016. And so if he can't get the house ready for rent, if he loses two months of rent, that can be taken care of in money damages. The James plaintiffs, they're gone. They say they've moved out of the house. And their damage is, "Well, we would have done some more repairs to the house

and" -- I don't know. Compensable by money damages.

Your Honor, public interest. And I mentioned -- and I'm sorry -- I mentioned the declarations. And if you haven't had a chance already, I do think the Marcel Bryar declaration is critically important to read; because I'm not a big believer in experts who are just experts, and that's what they do. Marcel Bryar ran the Fannie Mae program under the Obama administration, with respect to keeping people in their house, with respect to loan modifications. Fannie Mae and Freddie and Ginnie Mae collectively own 60 percent of the mortgages in this house -- in this country.

And what Mr. Bryar says is, this idea that banks, or banks through Safeguard, want folks out of their homes is a fantasy. I mean, again, it's good rhetoric, but it's the exact opposite of what anybody really wants. Because if someone is in default, and you're the mortgage company, you're the lender, you're missing out on principle, you're missing out on interest, maybe property taxes, but you have someone in the house, taking care of it. And with our preliminary injunction motion, we gave you pictures of, I think, the James property, which was vacant, and one other one, and what happens to properties when they're vacant. And so what lenders desperately want, even if somebody is in default, is for them to stay in the house through foreclosure, because they take care of the house. And only if, in fact, the property is

abandoned does it need to be secured. Because if it's not secured, then you've got crime, you've got fire, you've got blight, and you have all of those things that happen.

Your Honor, lastly, in terms of the injunction -- if I can find it -- I don't know how this order would read. The order that plaintiffs requested that you enter talks about prohibiting lockbox changes, talks about prohibiting lockboxes. It talks about prohibiting padlocks. It talks about all sorts of things that they now concede is -- are permissible, you know, in their briefing. And where they get to in their reply is, and I think sort of what you're asking me about is: Well, can we get Safeguard to just follow HB 2057? And I think the problem is, if you look at HB 2057, it will say to you, this is not an exclusive -- there are all sorts of other things that happen.

THE COURT: Well, at least the two examples that you gave, I already told you, I think, are part of the house bill. And so I'm not quite understanding that point.

MR. FELLER: Well, so, Your Honor -- well, look. So I think we, at some point, are going to need a ruling on, if a property is abandoned, can you do a lock -- at some point, we're going to need a ruling on, if the only thing that's happened is a secondary door has been changed -- and we know people get in on their own all the time -- is that within *Jordan*? And that's certainly not part of HB 2057. Right? And

so there are circumstances, and it -- we also can't necessarily foresee every possible circumstance.

THE COURT: Well, let me entertain this possibility. *Jordan* came to us because a federal judge asked the question.

MR. FELLER: Correct.

THE COURT: Should a federal judge go back and ask a clarification question?

MR. FELLER: Sure. Sure. Because, Your Honor -- and, again, we go back to the Bryar declaration. Your Honor, I am standing here in front of you as Safeguard's counsel, and I agree that the circumstance in *Jordan*, if you believe that you have a mortgage document that says you can enter just on default -- not Safeguard policy, by the way. Mr. Gatens said, "Oh, Safeguard will just do whatever the lenders say." Safeguard will not enter a property if it's occupied, period, no matter what. Okay?

But in the *Jordan* situation, if you have a document that says all you need is default -- somebody can be living there. Go ahead and come in -- if you have that, and you have a person who is actually living there, and goes to work and comes home that night -- again, not Safeguard policy. Safeguard -- you get a notice that, "Hey, we found it vacant, and in three days or so we'll secure it. Call us if you're there" -- again, not Safeguard -- but if that happens, that that cannot be the law, and the law cannot allow that set of circumstance. And I think

that is what the Washington Supreme Court was struggling with is, we cannot say that that's okay to do, but we are addressing this circumstance. And what the dissent said is, "You're wrong. That is okay to do," not because it's okay to oust people from their home. It's okay because this property was actually abandoned.

And so that is what the Supreme Court in *Jordan* was struggling with. And I don't think they thought about, well, gee, as it turns out -- because we now know, out of 19,000 properties, 18,400 of them, 97 percent, we now know were abandoned. Gone. Person doesn't even know about the lock change. You've then got another 400 where there was a lock change, and the person wanted to get in, and they got in, all on their own, without calling Safeguard, without calling the bank. So out of these 19,000 people, 18,400 abandoned, gone, don't even know the lock change took place. Four hundred got back in on their own. So what you're down to is 200 people where there was an issue, where they needed help getting back in. And we have to figure out a way to deal with those people. And I don't know if that's the bank's responsibility, or Safeguard's responsibility, or if that's a Consumer Protection Act claim, or a trespass claim, or a negligence claim, or something else. But we can figure out a way to deal with those 200 people.

What we have to figure out, and perhaps what the

Washington Supreme Court has to figure out, is that, did we really intend that where in 98 percent of these circumstances the property is abandoned, and there's no one taking care of it, and the roofs -- again, this isn't a parade of horribles. We gave you a declaration from the guy who ran the Obama administration's program trying to keep people in their homes. Where the roofs are caving in, where people are breaking in, where equipment is being stolen, did we really intend to not allow people to take care of that situation?

THE COURT: So the law is okay if only two percent of the population is offended by it?

MR. FELLER: Your Honor, that's -- no, it absolutely isn't. And that two percent, right, we're going to have to look at those individual cases. Right? But what typically happens, what typically happens in those two percent, okay, is going to be a circumstance where someone, very often -- first of all, there's just screwups. Right? I'm supposed to go to 734 Government Lane, and I went to 743. And it's just a screwup. Right? It's a human endeavor.

But what typically happens is that somebody moves out of the house, abandons it, and then comes back. And so that situation, right, the property was vacant, it -- the bank looked -- Mr. Bund's property in 2015, when the lock change was done, the grass was at 37 inches, three feet high. Anyone who looked at that property would have believed, in good faith,

that it was abandoned. Okay? Sometimes that turns out to be wrong. Sometimes the person comes back. Right? Sometimes -- I mean, there are -- you know, somebody's sick, somebody is with a family member. Things happen. And mistakes are made. And we've got to figure out -- again, there's all sorts of issues surrounding that, right, whose responsibility -- is that the bank's responsibility? Is that Safeguard's? Is that the responsibility of the mom-and-pop locksmith, down the line? We've got to figure out how to deal with that group.

But the claim that, under *Jordan*, the 98 percent who abandoned their property and took off, and the bank took care of the house so that it didn't burn, and so it didn't -- right? -- so people didn't break in, and so all those things -- that those people have a claim, that those people are entitled to compensation, I genuinely do not believe that that's what the Washington Supreme Court intended. And I think HB 2057 is an attempt to try and sort of get regular order back, understanding we have to be able to secure vacant properties.

So if I can just get two minutes for reply. Thank you.

THE COURT: Thank you.

Response?

MR. GATENS: Thank you, Your Honor.

You know, there was a lot about that that I think I won't respond to, because it's not germane to the Court's questions, and it's, frankly, not germane to the motion before the Court.

But there are a couple of representations and inaccuracies that I think must be addressed, right out of the gate.

And the first is with this notion, this unilateral, self-serving, unsupported, unsubstantiated notion that 98 percent of the class abandoned their properties. If that is not the fox watching the henhouse, I don't know what is. There is no evidence that they abandoned. And, in fact, all of the plaintiffs that appeared before this court had neither vacated nor abandoned their property, and that's why they've been in this litigation for years now.

But more importantly, the abandonment argument that's being posited by Safeguard now is not new news. That was well argued to the Washington State Supreme Court by both Nationstar and its amici, and, by the way, its amici, the FHFA, the Federal Housing Finance Association, which is the guarantor, the trustee for Fannie and Freddie. So the unbiased declaration, Mr. Meyer's declaration, that is pure as gold, was written by the same folks and same industry that's entry provision was held to be invalid. And so it is categorically incorrect to state that the Supreme Court in *Jordan* didn't consider the abandonment argument, from both the named defendant or its amici, and didn't categorically reject the abandonment argument.

And further proof of that is -- I'm not going to sit here and reread to the Court, verbatim, the decision in *Jordan*,

because the Court can read it for itself. But I will reiterate that what the *Jordan* court did was not narrow, whether you agree with it or not. It invalidated the entirety of the entry provision, in toto. And the knowledge of the invalidation, the broad impact of *Jordan*, has actually been acknowledged by Safeguard in their testimony, where they recognize the broad scope of the *Jordan* decision. And they themselves, at the time, stated that it allowed for pre-foreclosure entries only under the limited circumstances that plaintiffs are asking for now. The invention of a unilateral determination of abandonment is not consistent with *Jordan*. But most importantly, as a matter of law, under *Howard vs. Edgren*, under *Coleman vs. Hoffman*, and dating back to the late 1890s, under *Norfi* [sic], the court, the U.S. -- the Washington State Supreme Court has repeatedly held that 7.28.230's exclusive right of possession of the borrower does not grant any right of possession to the lender or its agents, including and specifically in the cases of abandonment. So the 98 percent have been determined abandoned is false, but it does not matter, because as a matter of law, abandonment does not give a right of possession under 7.28.230.

So the last part that I want to leave this Court with, which I think is germane -- and I don't believe I heard a direct answer to the Court's question to the defendant on how changing a lock isn't possession under the *Jordan* holding. And

I think that's because the answer is, it is. But I will leave this Court with: Why are we here? We're here because Safeguard's repeated testimony and representations to this Court is: We have conducted these lock changes on these class members. We conducted them multiple times on the same property. We will continue to do so, and we will not exercise discretion. We will take our clients' orders. And if they instruct us to order a lock change, we will do it, independent of *Jordan*; we will do it independent of 7.28.230; and we will do it independent of the new house bill as well. Because they won't exercise their discretion, this Court needs to.

THE COURT: Thank you.

MR. FELLER: Your Honor, very briefly, it's hard for me when Mr. Gatens stands up here and says none of the plaintiffs before you vacated or abandoned their home. He filed a declaration in this case, from the James plaintiffs, saying they had moved out of their home. There was no one living there. He has provided us with discovery. And Mr. Bund is sitting right here, saying, no one was living in the home. And so we can quibble about semantics, but the reality is that there is no individual before you who was living in their home at the time that it was secured, simply no one. Your Honor, Mr. Gatens -- and I thought I gave him an opportunity to tell you who that human being was, but there genuinely isn't one.

Is the change of a lock possession, under *Jordan*? The

answer is, it depends. The law is not that every lock change is possession. And I don't think it's possible to actually -- Mr. Gatens says, "Well, I'm not going to read to you what the *Jordan* opinion actually says." If you read the opinion, it is impossible to read that opinion without coming to the conclusion that it's driven by the specific facts of the case.

Two last points, Your Honor. One is, I didn't have an opportunity to talk about this alternate request: Well, gee, we should notify people whose house -- where locks have been changed, we should reverse lock changes, whatever that set of relief is. Again, Your Honor, there is not a single person, a single human being, who has ever come before you asking for that relief. And the reason is that those properties are abandoned.

And so, first of all, Safeguard doesn't necessarily have the ability to contact most of those people. Again, we take orders -- orders, not in terms of dictates, orders in terms of how we'd like you to do this -- from the bank. We don't necessarily have the person's name. We don't have forwarding information. We don't have the ability to contact them and say, "Hi, would you like us to reverse" -- it's just not something we have the ability to do. But the reality is, just doing it, what you have, the vast majority -- again, Mr. Gatens says, "Well, there's no evidence." You have the declaration. You have the sworn testimony of somebody from Safeguard, who

they've deposed twice, who's telling you, based on all of the information that we have, based on the fact these people haven't contacted us, that between 97 and 98 percent of these properties are vacant and abandoned, and no one has ever heard from these people again. That's the reality.

Last point, Your Honor, and I do want to thank you that you said you would take this motion and the motion for partial summary judgment together. If -- again, we had a motion requesting a status conference, but if I could just make a request that you also take with those -- and if it's okay with the Court, we'll file it as early as next week -- a motion to decertify and a motion to dismiss this class. Because we have one named representative who admits he does not own the property at issue in the case. And there's Ninth Circuit law -- and, again, for whatever it's worth, Your Honor, you've written on the subject yourself. Under those circumstances, the Ninth Circuit says the class must be decertified, and the case must be dismissed. And so before we get into preliminary injunctions, I think -- and, again, we just found this out. Right? The remarkable thing, to me, about the motion to substitute is, they say, well, this is somehow Safeguard's fault. You've been calling it the estate all this time. Well, yeah, because that's what you told us. That's how you filed the case.

We know now that this property was transferred to a

different legal entity in 2013. And I think we have to deal with that issue before we do anything else. Because if I'm right about what the Ninth Circuit says, we don't have a class rep in this case.

THE COURT: Okay. Counsel, first, I owe you an apology, because I haven't moved on these as fast as I told you that I would. And there's essentially two reasons for that. And the first reason is that I seem to be overly blessed or overwhelmed with President Trump's cases. Because I managed to wind up getting three of them, and they take significant amounts of time, and they have to be moved on quickly.

The second reason, though, is really part of this litigation, is that every time I get ready to issue an opinion, there is another motion that is intertwined. And so I'm left with trying to sort through is there a motion that basically cuts off the others, in evaluating that. And that's a lot of material. So I apologize. I take responsibility for that.

But your -- this particular piece of litigation has lots of threads. It's a little bit like a braided rope. So I promise that we will work on it, and that -- I promise that if I see that we need conferences, we'll have conferences. But that's my excuse. So we will work on this, but there are others that I have to sort through to see if, are there other motions that make a preliminary injunction not appropriate. And I can't do that until I've had the time to work through it.

So one of the ways, though, that you can help me is, you could tell me what order you think they ought to be decided in. And if there is one that you believe cuts off everything else, tell me so. But that would be helpful.

MR. FELLER: So, Your Honor, I think there's two. And as I said, one of them I can file as soon as the Court allows me to file. But let me talk about the one that you have.

So the one you have that cuts off everything else, essentially, as a practical matter, is the motion for -- Safeguard's motion for partial summary judgment. Because the claim-splitting part of it is complicated, but the good faith part of it, I think, is really hard to argue with. And I think it disposes of about 18,500 -- there's -- there would be 475 potential. That's overstated too. But there would be 475 properties potentially left, because it would cut off everything pre-*Jordan*. And it's -- I obviously don't want to get into arguing it. But I don't know even how you argue with the idea that, when this court dismissed a case, the *Ocwen* court dismissed a case, an opinion from the Supreme Court was sought on the issue, there was three dissenters -- this is what everyone's done in Washington since mortgages began. This is exactly what's done in 49 other states. I don't know how you argue that that is not good-faith conduct. And if that's right, then that disposes of, again, 98 percent of the class.

So that's one.

And, two -- and, again, the way I usually do this is, I ask the Court's permission, and I talk to opposing counsel, and I try to get, you know, a briefing schedule. But two is, I think, based on the disclosures that have been made within two weeks, regarding ownership of the estate, I think the Court's only course is going to be to decertify the class and dismiss the case.

THE COURT: Actually, I'm a little confused by getting the Court's permission. This isn't a district where you have to have permission to file.

MR. FELLER: Again, Judge, just -- candidly, Your Honor, you've got at least four sets of motions before you, and you've got other stuff being filed. So I just -- I do it out of respect. If I didn't need to, then I'll just go ahead and file it. But the way I practice is, I like to do it in a cooperative way.

THE COURT: Well, it's not a district that does these mother-may-I letters to the Court ahead of time. I actually think that's a bit silly. But I do appreciate that it's been a bit overwhelming with the numbers of motions and their intertwined nature.

All right. That gives me some idea. Do the plaintiffs have anything that they think is -- that I should turn to first?

MR. GATENS: Yes, Your Honor. The answer to the Court's question, the first comment that I'd have is, the solution to the current caseload facing this Court is not more motions. Right? And that's what we just heard is, we want to file more motions. I would suggest that that's not the solution to the challenge that the Court is facing.

With regard to the current motions before the Court, of which the defense has filed the majority of them, the current motion, under Rule 17, which directly addresses and very simply acknowledges the substitution of John Bund as the estate for John Bund as the trustee of the trust, is straightforward, simple, and we think properly before the Court to make a very easy determination on that front. Moving to decertify the class, when there's another named class member that could be recertified, this is problematic. This is part of what we see as an overburden on the court, and not efficient to the judicial administration. So a quick ruling on the Rule 17 motion to substitute in the trust for the estate -- it's all the same human being. It's always been the same human being. It's the same property. There's no substantive difference, and Rule 17 expressly addresses that -- would make sense.

The motion for preliminary injunction has been pending for a long time. And the testimony that Safeguard cannot get away from, can't even answer this Court, here today, about whether they're going to comply with the recent house bill, means that

this is ongoing, and this is immediate, and it's real. The Court needs to -- respectfully -- enjoin that type of behavior. It is informed enough at this stage, through the multiple and repeat motions that Safeguard files about, "We couldn't have known," or, "We didn't know," to know that what it can't ever get away from, just like it can't get away from its testimony here today that it's not going to exercise discretion, is that it never undertook any review of Washington law. If it didn't take any review of Washington law, it couldn't have been acting in good faith.

But the Court can get to that issue when it gets to the substantive issues. It needs to address the request to substitute Mr. Bund in as trustee for the estate. It needs to rule on the parties' preliminary injunction, because they have shown a likelihood of success on the merits. And then the Court needs to rule on the merits of this case. And I respectfully posit that it should do that before there are more motions filed before this Court.

THE COURT: Thank you. That's helpful.

Just as an interesting aside, I don't know if you're aware, but three of the five positions in Seattle have been vacant for two-and-a-half years, and we now have new nominations. But we don't expect those to move through quickly. So please bear with us, and we'll work on your motions.

All right. Thank you, Counsel.

(Adjourned)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ *Andrea Ramirez*

ANDREA RAMIREZ
COURT REPORTER